IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVE HEDDRICK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE COURT VIOLATED HEDDRICK'S DUE PROCESS RIGHTS IN PROCEEDING TO TRIAL WITHOUT CONDUCTING A COMPETENCY HEARING.

It is settled that a defendant's due process right to a fair trial requires the trial court to conduct an evidentiary hearing whenever there is reason to doubt a defendant's competency, even if the defendant does not request such a hearing. See, e.g., Pate v. Robinson, 383 U.S. 375, 377, 385, 86, S. Ct. 836, 15 L. Ed.2d 815 (1966); Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001); United States v. Denkins, 367 F.3d 537, 547 (6th Cir. 2004); Johnson v. Norton, 249 F.3d 20, 26 (1st Cir. 2001); Carter v. Johnson, 131 F.3d 452, 459 n.10 (5th Cir. 1997); Silverstein v. Henderson, 706 F.2d 361, 369 (2d Cir. 1983). In light of this constitutional mandate, once the trial court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must order a formal evidentiary hearing to determine competency before proceeding to trial. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); State v. Israel, 19 Wn. App. 773, 776, 577 P.2d 631 (1978).

a. The Trial Court Found Reason To Doubt Heddrick's Competency.

The state argues an evidentiary hearing was unnecessary because Judge Yu never made a threshold determination that there was reason to doubt competency. Brief of Respondent (BOR) at 8, 18-19. This contention does not bear even passing scrutiny. Judge Yu herself entered a written pre-trial order that unequivocally states there was reason to doubt Heddrick's competency. CP 38-41. This order, printed on the state's own form, spells out the need for an evaluation to address the competency issue in detail:

> The report of the evaluation shall include the following pursuant to RCW 10.77.060:
> C(1). A description of the nature of the examination;
> C(2). A diagnosis of the defendant's mental condition;
> C(3). COMPETENCY: an opinion as to the defendant's capacity to understand the Proceedings and to assist in defendant's own defense; If the report concludes the defendant is incompetent to proceed, an opinion whether psychotropic medications are necessary to restore the defendant's competency; (and if so, what medications he should take).

CP 40.

The order further states "[t]his action is stayed during this examination period and until this court enters an order finding the defendant competent to proceed."[1] CP 41.

In Pate v. Robinson, the Illinois competency statute at issue directed the trial court to hold a competency hearing on its own motion whenever there was a "bona fide reason" to doubt competency. Pate, 383 U.S. at 378, 385. The United States Supreme Court held the trial court's failure to hold such a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Id. at 385. Heddrick's case is different in one important respect. Unlike the judge in Pate, Judge Yu made a threshold determination that there was reason to doubt Heddrick's competency. This is not a case, then, where Heddrick on appeal must demonstrate there was a reason to doubt competency in order to show the trial court erred in not conducting an evidentiary hearing. C.f. Lord, 117 Wn.2d at 903-04 (trial

[1] It appears from the record that Judge Yu never entered a written order finding Heddrick competent. The state argues the court did not need to find Heddrick competent because he was presumed competent pursuant to the earlier findings entered on January 20, 2005. BOR at 18-19. First, Judge Yu's order, in specifying that the action is stayed until entry of an order finding the Heddrick competent to proceed, dispels any notion that he was presumed competent. Second, although Judge Yu never entered a written order finding Heddrick competent, Judge Yu's ultimate decision to proceed to trial based on defense counsel's representations shows she implicitly and necessarily determined Heddrick competent to stand trial.

court did not err in failing to hold hearing because defendant did not meet threshold burden of establishing reason to doubt competency).

The state attempts to bypass the due process requirement of an evidentiary hearing by arguing the plain language of Judge Yu's written order does not mean what it says. BOR at 8 n.3. Specifically, the state maintains the order is inaccurate in that Judge Yu never found reason to doubt competency and never ordered a competency evaluation. BOR at 8 n.3. The state offers no authority for the proposition that the unambiguous meaning of a trial court's written order should be disregarded on appeal.

The state further claims Judge Yu properly relied on the earlier determination of competency entered on January 20, 2005 as the basis for proceeding to trial. BOR at 18, 20-21; CP 7-8. There is nothing in the record to indicate Judge Yu relied on the previous competency determination, nor would it have been proper for the court to do so. Judge Yu's threshold determination that there was reason to doubt Heddrick's competency in August 2005, superseded Judge Trickey's determination in January 2005 that Heddrick had been restored to competency. See Moore v. United States, 464 F.2d 663, 665-66 (9th Cir.1972) (records showing defendant's history of mental illness and instability raised doubt as to competency even though current psychiatric report found him competent); Chavez v. United States, 656 F.2d 512, 518 (9th Cir.1981) (hearing

required when there is psychiatric evidence of past incompetence and more recent evidence indicating that such incompetence may have recurred); Denkins, 367 F.3d at 547 (accepting defendant's plea before ordering a competency examination would be improper where there is substantial temporal gap between defendant's competency evaluation and the proceeding or hearing at which his competency is called into question).

It is also significant that Judge Trickey's "Findings of Fact and Conclusion of Law Regarding Defendant's Competency," in which Heddrick was determined competent in January 2005, contains only legal conclusions, not findings of fact.[2] CP 8. Judge Yu could not have relied on previous findings of fact in determining present competency when there were, in fact, no findings to rely upon.

b. The Trial Court Had The Duty to Make An Independent Determination Regarding Heddrick's Competency.

In support of its position that the court observed adequate procedural safeguards, the state relies heavily on the fact that Heddrick's own trial lawyer ultimately declined to contest competence. BOR at 8, 16, 20. Although considerable weight should be given to an attorney's

[2] "If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law." State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986).

opinion regarding a client's competency, a lawyer's opinion alone cannot be determinative of the issue. State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998). Indeed, "counsel is not a trained mental health professional, and [her] failure to raise petitioner's competence does not establish that petitioner was competent. Nor, of course, does it mean that petitioner waived his right to a competency hearing." Odle, 238 F.3d at 1088-89 (trial court erred in not conducting evidentiary hearing even though no one questioned defendant's competence over the course of two years of pre-trial proceedings and twenty-eight days of trial). For these reasons, failure of the defense attorney to ask for a competency hearing may not be considered dispositive evidence of the defendant's competency. Id. A reason to doubt competency does not magically disappear because defense counsel no longer contests the issue. Once the trial court determines there is a reason to doubt competency, as it did here, the court is required to hold an evidentiary hearing on the issue regardless of whether defense counsel requests one. Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004).

The cavalier attitude with which defense counsel ultimately dispensed with the competency issue is troubling. "For the defendant, the consequences of an erroneous determination of competence are dire." Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S. Ct. 1373 (1996) (holding

burden upon defendant to prove incompetency may not exceed preponderance of evidence). Because an incompetent lacks the ability to communicate effectively with counsel, he may be unable to exercise rights deemed essential to a fair trial or effectively make myriad smaller decisions concerning the course of his defense. Id. "The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a fundamental component of our criminal justice system -the basic fairness of the trial itself." Id. (citation and internal quotation marks omitted). Defense counsel stated she did not feel it was necessary for the evaluator to produce a written report because she no longer contested competency and "out of consideration for the amount of money that it would have cost in addition to what we already spent to produce a written evaluation." 11RP[3] 15. Defense counsel's job is to zealously defend her client's right to a fair trial, not to serve as guardian of the state's coffers. In the absence of both a written expert report and an evidentiary hearing, defense counsel deprived Judge Yu of the opportunity to make an informed decision regarding Heddrick's competency, and

[3] The state's designation of the verbatim report of proceedings is correct. BOR at 4 n.1. The designation in this brief conforms to the state's designation. An amended opening brief using the correct designation will be filed as well.

Judge Yu erred in acquiescing to counsel's invitation to proceed to trial under such circumstances.

In arguing there was no legitimate question of Heddrick's competency, the state also attaches significance to Dr. White's opinion, orally conveyed by defense counsel during the October 6, 2005 telephone conference, that Heddrick was competent. BOR at 16. White's opinion, even if taken at face value, is virtually worthless. A barebones oral conclusion that Heddrick was competent offered up as second-hand hearsay by defense counsel cannot meaningfully substitute for an evidentiary hearing on the matter. Here, the court had no evidence before it as to how White derived his ultimate opinion. 11RP 14-15. Defense counsel merely relayed the gist of his oral conclusion. There was no description of the nature of the examination or the methodology used by White to formulate his purported conclusion. There was no diagnosis of Heddrick's mental condition, past or present, and no explanation as to why White changed his mind regarding competency. Without this vital information, the trial court had no way of determining whether White's opinion was sound.

Even if White's naked conclusion of competency retained any probative value, "[i]t is the duty of the trial court to make a specific judicial determination of competence to stand trial, rather than accept

psychiatric advice as determinative on this issue." United States v. David, 511 F.2d 355, 360 n.9 (D.C. Cir. 1975). "In the final analysis, the determination of competency is a legal conclusion; even if the experts' medical conclusions . . . are credited, the judge must still independently decide if the particular defendant was legally capable of reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him." United States v. Makris, 535 F.2d 899, 908 (5th Cir. 1976). By accepting, without further scrutiny, defense counsel's oral representation that Dr. White said Heddrick was competent, the court abandoned its ongoing duty to make an informed and independent decision regarding Heddrick's competency.

c. There Was Substantial Evidence Showing Reason to Doubt Heddrick's Competency.

The state in its brief argues Heddrick's demeanor and behavior provided no reason to doubt Heddrick's competency. BOR at 17-18. Again, Judge Yu had already found reason to doubt competency and there was no further need for Heddrick to raise additional doubt after the court's initial finding. CP 38-41. In any event, "[w]hile [the defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." Pate, 383 U.S. at 386. The state is disingenuous in stating Judge

Yu had four days of pretrial hearings in which to observe Heddrick's demeanor. BOR at 17. Between the time the court initially found reason to doubt Heddrick's competency on August 1, 2005 and the court's decision to proceed to trial on October 6, 2005, the record shows Heddrick was in court on only one occasion (September 26, 2005), and there is no description of Heddrick's demeanor at that time. 9RP 1-6. In any event, calm behavior in the courtroom is not necessarily inconsistent with mental incompetence because some forms of incompetence do not manifest themselves through erratic behavior. Odle, 238 F.3d at 1088. Heddrick's behavior in the courtroom after the court found reason to doubt his competency, assuming it was uneventful, does not refute the large body of evidence which tended to cast doubt on his competence. "[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." Id. at 1089. "The judge may be lulled into believing [a defendant] is competent by the fact that he does not disrupt the proceedings, yet this passivity itself may mask an incompetence to meaningfully participate in the process." Id.

The state also emphasizes Heddrick appeared to understand the nature of the proceedings. BORat 17-18, 20. This reasoning offers no justification for ignoring Heddrick's undisputed history of pronounced irrational behavior. Pate, 383 U.S. at 385-86. Moreover, the ability to understand the nature of the proceedings alone does not make a defendant competent. A defendant must also be able to effectively assist counsel. In re Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed.2d 824 (1960)); RCW 10.77.010(14); RCW 10.77.050.

The state strives mightily to frame the issue as one in which defense counsel alone expressed a doubt about Heddrick's competency. BOR at 1, 8, 15-16, 20. The state has done so in order to persuade this Court that counsel's motion for a competency evaluation on July 27, 2005 was little more than a passing whimsy without factual basis. BOR at 20. But no less than three trial judges recognized a problem with Heddrick's competency during the course of this case. Not only did Judge Yu grant counsel's motion and enter a written order finding reason to doubt competency, Judge Lum before her also found reason to doubt competency, while Judge Trickey previously found him incompetent. CP 38-41, 92, 94-96; 1RP 3-10, 13; 7RP 18-22. Heddrick was represented by two different attorneys, and both moved the court to conduct a

competency evaluation. 1RP 3-10; 7RP 6-11, 15. Two different prosecutors also expressed concerns about Heddrick's competency, with one actually joining defense counsel in moving for incompetency. 1RP 7-10, 11-12; 7RP 5.

The state in its brief tellingly ignores Heddrick's pronounced history of psychotic behavior, instead suggesting Heddrick's prior determination of incompetency and his history of schizophrenic delusions had no bearing on the issue of whether Judge Yu should have held an evidentiary hearing before proceeding to trial. BOR at 19. Heddrick's demonstrated history of incompetence, coupled with more recent evidence of decompensation, was enough to give Judge Yu a reason to doubt Heddrick's competency as of July 2005. Moore, 464 F.2d at 666; Chavez, 656 F.2d at 518. Dr. White, in his earlier written report concluding Heddrick was incompetent, stated that Heddrick suffered from *chronic* mental health problems resulting in strong persecutory and somatic delusions. CP 125. White diagnosed Heddrick with a psychotic disorder and probable paranoid schizophrenia, and opined that organic brain syndrome may have contributed to his psychiatric difficulties. CP 126-27. Dr. Marquez, in his report concluding Heddrick was competent, nevertheless stated Heddrick was "fundamentally paranoid and delusional

and clearly lacking in insight." CP 132. Both doctors agreed Heddrick's mental problems, while variable in intensity, were persistent.

The state in its brief further suggests Heddrick's psychotic history should be ignored because White's initial finding of incompetency was limited to Heddrick's condition "at the present time." BOR at 19-20. But Heddrick's mental instability cuts in favor of Heddrick's position on appeal. See Denkins, 367 F.3d at 547 (accepting defendant's plea before ordering a competency examination would be improper where evidence indicates defendant's condition fluctuates over time). White recognized in his initial written report that Heddrick's mental condition was unstable, that he had decompensated in the past and was at risk of deteriorating in the future. CP 126, 127. Marquez likewise recognized Heddrick was at risk for going off his medications and decompensating. CP 134. In concluding Heddrick was competent, Marquez reported "[h]is clinical symptoms, though troubling and significant, appear to be adequately contained *at this time.*" CP 133 (emphasis added). On July 27, 2005, the state shared defense counsel's concern that Heddrick's condition was deteriorating. 7RP 5.

Significantly, Heddrick had earlier been restored to competency only after being forcibly medicated. CP 132, 134. Equally significant, Heddrick was adamant he would not voluntarily take any medication, and

White had earlier reported Heddrick's mental health problems could worsen if he were found competent and incarcerated without medical treatment. CP 120, 126, 127. Yet prior to proceeding to trial, there is no indication Judge Yu inquired whether Heddrick received any medication between the time of Judge Trickey's competency finding in January 2005 and the start of trial some ten months later, during which period Heddrick remained incarcerated. See Drope v. Missouri, 420 U.S. 162, 181, 95 S. Ct. 896, 904, 43 L. Ed.2d 103 (1975) ("a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."). In Miles v. Stainer, the Ninth Circuit held the trial court generally erred in not holding a competency hearing and specifically erred in failing to inquire whether the defendant was taking his medication despite the strong warnings in the court file suggesting the need to ask the question. Miles v. Stainer, 108 F.3d 1109, 1112-13 (9th Cir. 1997); see also Moran v. Godinez, 972 F.2d 263, 265 (9th Cir.1992) (court's failure to inquire about the four psychiatric medications defendant was taking raised doubt about competence on appeal), overruled on other grounds, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed.2d 321 (1993). The same situation presented itself to the trial court here. Indeed, the trial court did not ask Heddrick a single question from the point where it ordered a competency evaluation on

August 1, 2005 to the time Heddrick proceeded to trial in October 2005. C.f. Miles, 108 F.3d at 1112 (trial court's perfunctory questioning of defendant during plea colloquy insufficient evidence of defendant's competence where court on notice that competence was an issue).

In short, there were plenty of danger signs here. Judge Yu initially recognized them by finding a reason to doubt competency, but ultimately ignored them once defense counsel decided not to contest the issue. This was error.

d. The Trial Court Did Not Have The Discretion To Disregard Heddrick's Constitutional Due Process Right To An Evidentiary Hearing.

The state claims the trial court did not abuse its discretion in failing to conduct an evidentiary hearing. BOR at 15. It is within the trial court's discretion to order a competency evaluation. Fleming, 142 Wn.2d at 862. Judge Yu exercised her discretion by properly ordering a competency evaluation upon finding a reason to doubt Heddrick's competency. CP 38-41. Once Judge Yu made this critical threshold determination, however, it was no longer within her discretion to decline to hold an evidentiary hearing. It is established that a defendant's due process right to a fair trial *requires* the trial court to conduct a hearing whenever there is reason to doubt a defendant's competency, even if the defendant does not request such a hearing. Pate, 383 U.S. at 385-86; Porter v. McKaskle, 466 U.S.

984, 985, 104 S.Ct. 2367, 80 L.Ed.2d 838 (1984); Marshall, 144 Wn.2d at 278; Lord, 117 Wn.2d at 901; Israel, 19 Wn. App. at 776; Odle, 238 F.3d at 1087; Denkins, 367 F.3d at 547; Johnson, 249 F.3d at 26; Silverstein, 706 F.2d at 369; Carter, 131 F.3d at 459 n.10.

To the extent, if any, State v. Johnston, 84 Wn.2d 572, 576-77, 527 P.2d 1310 (1974) and State v. Higa, 38 Wn. App. 522, 525, 685 P.2d 1117 (1984) hold the trial court has discretion to hold an evidentiary hearing after finding a reason to doubt competency, such holdings and are no longer good law because they cannot be reconciled with the now established rule that a hearing is constitutionally required in that circumstance. See id. Assuming the discretionary standard were appropriate, Judge Yu would have abused her discretion in declining to hold an evidentiary hearing under the circumstances of this case. See, e.g., Israel, 19 Wn. App. at 776-78 (although no written expert report provided, due process satisfied because trial court held evidentiary hearing to determine competency after finding reason to doubt competency); State v. Brooks, 16 Wn. App. 535, 538, 557 P.2d 362 (1977) (trial court did not err in failing to comply with competency procedures of RCW 10.77.060 requiring two appointed experts; there was "substantial compliance with the purpose and intent of the statute because defendant received a full competency hearing.").

2. THE "TO CONVICT" INSTRUCTION OMITTED AN ELEMENT OF THE CRIME.

To prove Heddrick guilty of felony harassment, the state had to prove, as an element of the crime, that Patricia Anderson had actual knowledge of the threat. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001); State v. Kiehl, 128 Wn. App. 88, 93, 113 P.3d 528 (2005), rev. denied, 156 Wn.2d 1013, 132 P.3d 147 (2006). The "to convict" instruction was erroneous because it did not include this element. CP 53 (Instruction 7).

The state acknowledges the law requires the person threatened must be aware of the threat, but still claims the "to convict" instruction contained all the elements of the crime. BORat 21. The state's reasoning is that the jury could not have concluded Anderson was in reasonable fear of Heddrick's threat unless it necessarily concluded Anderson knew of the threat. BORat 21, 24.

A defendant, however, "cannot be said to have a fair trial if the jury might assume that an essential element need not be proved." State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001) (citation and internal quotation marks omitted). Here, the jury was allowed to assume Anderson need not learn of Heddrick's threat. Such an assumption is particularly problematic because the state introduced evidence of a number of threats

purportedly made by Heddrick, but Anderson testified she remembered only hearing about one of them. 11RP 66-67, 74, 75; 12RP 18-19, 21, 28, 36-39. The prosecutor nevertheless invited the jury during closing argument to convict Heddrick based on all of the threats he supposedly made. 12RP 58-59. There is a risk the jury convicted Heddrick for making a threat Anderson never learned about.

The state disagrees that the failure to instruct on an essential element is automatic reversible error, citing Washington v. Recuenco, -- U.S. --, 126 S. Ct. 2546, 165 L. Ed.2d 466 (2006). BOR at 26 n.12. Recuenco breaks no new legal ground, relying upon Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999) for the proposition that only errors which "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" require automatic reversal. Recuenco, 126 S. Ct. at 2551 (quoting Neder, 527 U.S. at 9).

This Court recently reaffirmed that, in Washington at least, the failure to instruct on an essential element is automatic reversible error. State v. Gonzalez-Lopez, 132 Wn. App. 622, 637, 132 P.3d 1128 (2006). Even assuming harmless error analysis were appropriate here, instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d

548 (1977). The state has not shown harmlessness, nor could it, given the evidence of numerous threats and the prosecutor's closing argument in which she exhorted the jury to convict Heddrick based on threats Anderson never heard about.

3. THE COURT VIOLATED HEDDRICK'S RIGHT TO A JURY TRIAL BY ALLOWING LAW ENFORCEMENT WITNESSES TO GIVE IMPROPER OPINIONS REGARDING HEDDRICK'S GUILT AND VERACITY.

No witness, lay or expert, may opine as to the defendant's guilt or veracity. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003). The officers' testimony that they did not believe Heddrick when he denied the seriousness of his statements was an improper comment on Heddrick's credibility and, by extension, his guilt. 12RP 19-20, 25, 39-40.

a. The Error May Be Raised For The First Time On Appeal.

The state argues RAP 2.5(a) precludes review of Heddrick's claim that the trial court permitted improper opinion evidence. BOR at 26-27. RAP 2.5(a)(3) provides a "manifest error affecting a constitutional right" may be raised for the first time on appeal. The state cites City of Seattle v. Heatley, 70 Wn. App. 573, 583-86, 854 P.2d 658 (1993) for the

proposition that the admission of improper opinion testimony on guilt may not be raised for the first time on appeal because it is not an error of constitutional magnitude. BOR at 27. Heatley held no such thing. Rather, the court held improper opinion on guilt should not *automatically* be considered an error of constitutional magnitude without evidence that the claimed error is "manifest" within the meaning of RAP 2.5(a)(3). Heatley, 70 Wn. App. at 583, 586.

An error is "manifest" when there is "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed error to see if the argument has a likelihood of succeeding under harmless error analysis. Id. A constitutional error is harmless only if (1) the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error; and (2) the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Although the exception carved out by RAP 2.5(a)(3) is a narrow one, an appellate court may not decline to pass on the merits of a

constitutional error and thereby shortcut the review process by simply deciding the error is insufficiently "manifest." State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

Heddrick has made a plausible showing that the improper opinion evidence had identifiable consequences at trial in his opening brief, and that analysis need not be repeated here. See Opening Br. of App. at 29-32, 42-43. This Court should therefore fully review the merits of his claim.

b. The State's Claim That Officers Did Not Give Impermissible Opinions Is Unsupported By Case Law Or Reason.

The state attacks, as specious, Heddrick's argument that the officers improperly testified that his threats were "knowingly" made. BOR at 33. The "knowingly threaten" element of the crime is established if the defendant "subjectively" knows that he is communicating a threat; "[i]t must . . . be a real or serious threat. Idle talk, joking, or puffery does not constitute a knowing communication of an actual intent to cause bodily injury." State v. J.M., 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001); see also State v. E.J.Y., 113 Wn. App. 940, 952, 55 P.3d 673 (2002) (trial court adequately addressed "knowingly threaten" element in finding no question as to speaker's intent in making the statement). The officers testified they did not believe Heddrick when he said he was not serious

about making the statements. There is no question, then, that the officers' opinions went directly to the "knowingly threaten" element of the crime. The state, however, is correct in pointing out that the officers' opinions also spoke to the "true threat" element of the crime contained in the "to convict" instruction. BOR at 26, 32-34; see State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) ("A true threat is a serious threat, not one said in jest, idle talk, or political argument."). The prejudicial impact of the officers' opinions must therefore be measured against the fact that the officers expressed their personal belief that two elements of the crime had been established rather than one.

The state argues the jury was entitled to hear evidence about the context and circumstances under which Heddrick made his statements, and that Heddrick's demeanor was probative evidence of the "true threat" element. BOR at 32-33. This argument is correct as far as it goes, but the officers' testimony went far beyond a description of Heddrick's demeanor. The officers were free to testify that Heddrick, based on the tone of his voice, appeared agitated as he made his statements. If the officers had limited their testimony to that lay observation, there would be no problem because the jury, as the exclusive trier of fact, would be left to their own devices to believe or disbelieve Heddrick's testimony and to infer whether Heddrick's demeanor supported the "knowingly made" and "true threat"

elements of the crime. As it was, the officers, in effect, told the jury Heddrick was lying when he said he was not serious about making the threats. This testimony invaded the fact-finding province of the jury.

In attempting to mitigate the severity of the officers' opinions, the state points out neither officer made a direct statement about Heddrick's guilt. BOR at 35. First, a witness may not offer such an opinion by direct statement or inference. Black, 109 Wn.2d at 348; Jones, 117 Wn. App. at 92. An inferential statement can be just as damaging as a direct one, and there is no logical reason to give a free pass to inferential statements which prejudice a defendant simply because they happen to be indirect. Second, the officers did give direct statements about Heddrick's veracity in expressing their personal belief that Heddrick was lying when he claimed he was not serious about making the statements.

The state cites State v. E.J.Y. in support of its position that the officers' testimony here was proper. BOR at 31. In E.J.Y., the court held there was sufficient evidence to support the element of felony harassment which requires the person threatened have a "reasonable fear that the threat will be carried out." E.J.Y., 113 Wn. App. at 953. In the course of making that determination, the court noted the victim testified "because of E.J.Y.'s facial expression, she felt he was upset and believed E.J.Y had meant what he said." Id. E.J.Y. does not help the state's argument here

for two reasons. First and foremost, the defendant in no way challenged the propriety of the victim's testimony either at trial or on appeal, and thus the appellate court did not pass on the issue. Second, the element of reasonable fear is measured from the perspective of the person threatened, not a third party who happens to be aware of the threat but does not himself feel threatened. RCW 9A.46.020(b). Heddrick did not threaten the officers, and so their opinions as to whether Heddrick meant what he said were inadmissible. See State v. Barr, 123 Wn. App. 373, 382-83, 98 P.3d 518 (2004) (officer gave improper opinion on guilt by testifying defendant's behavior indicated he was being deceptive).

The state also claims the officers' testimony did not constitute impermissible opinion because it explained why they felt the need to warn the Andersons. BOR at 34. Assuming such testimony explained the officers' motivation in contacting the Andersons does not cleanse the prejudicial taint of their opinions. These opinions were gratuitously sought and self-servingly given; an explanation as to why the officers felt the need to warn the Andersons provided, at best, marginal context for the state's theory of the case.

The state further argues the testimony was properly admitted because it provided the necessary context for the trier of fact to assess whether a reasonable person would foresee that Heddrick's statements

would be interpreted as a serious expression of an intent to inflict bodily harm upon another. BOR at 26. The officers, by personally vouching for the jury that two elements of the crime had been established, certainly provided "context." But if opinion evidence on the guilt and veracity of a defendant is admissible as long as it provides "context" to the trier of fact, then no opinion, no matter how egregious, would ever qualify as improper. Such a standard would swallow the rule against opinion evidence and is unsound for that reason.

4. LAW ENFORCEMENT OFFICERS REPEATEDLY CHARACTERIZED HEDDRICK'S STATEMENTS AS "THREATS," THEREBY GIVING AN IMPROPER LEGAL CONCLUSION REGARDING HEDDRICK'S GUILT.

A witness may not testify that "the defendant's conduct violated a particular law" and thereby give an opinion as to guilt. State v. Olmedo, 112 Wn. App. 525, 532, 533, 49 P.3d 960 (2002). The state argues the officers did not use the word "threat" as a legal conclusion; rather, they used the word to describe Heddrick's demeanor, why they took the statements seriously, and why they communicated the statements to the Andersons. BOR at 37. Even assuming this to be the case, the officers' subjective intent in offering such testimony is irrelevant to an objective assessment on appeal of whether their testimony had a prejudicial effect

on the verdict. The officers, in using the term "threat" to describe Heddrick's statement, gave a legal conclusion. See Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987) ("If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law."). It cannot be said beyond a reasonable doubt that the jury's deliberations were not unduly influenced by officer testimony which repeatedly presumed a basic element of the crime had already been established.

5. THE COURT VIOLATED HEDDRICK'S RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO STRIKE OFFICER TESTIMONY THAT HEDDRICK HAD "A DISREGARD FOR THE LAW."

A law enforcement officer testified Heddrick had "a disregard for the law." 12RP 20. Defense counsel objected on the ground of "speculation." 12RP 20. The trial court sustained the objection but inexplicably refused counsel's motion to strike the offending testimony. 12RP 20-21.

The state claims Heddrick waived review of this error because a party may assign error in the appellate court only on the specific ground of the evidentiary objection made at trial. BOR at 42 (citing State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976)). This rule is inapplicable because it operates only when the defendant seeks review of

the court's failure to sustain an objection below. Here, the trial court sustained defense counsel's objection. No error is assigned to that ruling on appeal. Rather, error is assigned to the court's refusal to strike the improper testimony after sustaining the objection. When a trial court sustains an objection to the admission of improper testimony but declines to grant a motion to strike the evidence from the record, the testimony remains in the record for the jury's consideration. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); State v. Stackhouse, 90 Wn. App. 344, 361, 957 P.2d 218 (1998). At best, by sustaining the objection based on "speculation" but refusing to strike the testimony from the jury's consideration, the trial court in effect told the jury that it was free to consider the testimony for any purpose other than "speculation." In this manner, the jury was given free reign to consider the officers' testimony as evidence of Heddrick's law-breaking character.

B. CONCLUSION

For the reasons stated above and in appellant's opening brief, this Court should reverse Heddrick's conviction and remand for a new trial.

DATED this 19th day of December, 2006.

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